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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x  
4 A.R., individually and on  
behalf of all others similarly  
situated, et al.,

5 Plaintiffs,

6 v.

15 Cv. 9242 (RMB)

7 CITY OF NEW YORK, et al.,

8 Defendants.  
-----x

9 September 7, 2016  
11:45 a.m.

10 Before:

11 HON. RICHARD M. BERMAN  
District Judge

12 APPEARANCES

13 BERANBAUM MENKEN LLP  
14 Attorneys for Plaintiffs  
SCOTT SIMPSON

15 GISKAN, SOLOTAROFF ANDERSON & STEWART LLP  
16 Attorneys for Plaintiffs  
ALIAKSANDRA RAMANENKA

17 RAYMOND AUDAIN  
NAACP, Legal Defense and Educational Fund

18 ZACHARY CARTER  
Corporation Counsel of the City of New York  
MICHAEL K. GERTZER  
Assistant Corporation Counsel

21 KOEHLER & ISAACS  
Attorneys for Defendants Capers and Graham  
22 JULIE A. ORTIZ

23 FRANKIE & GENTILE, P.C.  
Attorneys for Defendant Mayweather  
24 JAMES FRANKIE

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1 (Case called)

2 THE COURT: My notes indicate that we need to  
3 accomplish at least one or two things today. One is to find  
4 out precisely what the status is of discovery and where the  
5 case is, and then also, or simultaneously, to find out what the  
6 status, if any, is of any settlement discussions or  
7 negotiations or where that stands.

8 So who wants to start?

9 MR. SIMPSON: Scott Simpson, Beranbaum Menken LLP, for  
10 the plaintiffs. Good morning, your Honor.

11 THE COURT: Good morning.

12 MR. SIMPSON: The parties are in discovery and,  
13 unfortunately, the process has been going very slowly. We have  
14 had conferences with Judge Fox. We had numerous meet and  
15 confers with the city, and it seems like repeatedly the city  
16 will set a self-imposed deadline to get things moving, and they  
17 have not been following these deadlines, which has been  
18 incredibly frustrating for moving the case along.

19 THE COURT: Can't the magistrate judge set some dates  
20 that are final? Why don't we just do that?

21 MR. SIMPSON: I think the next step, because the  
22 parties have been trying to work some of these issues out on  
23 their own, the next step is to contact Judge Fox and possibly  
24 ask for a more involved intervention on his part, possibly a  
25 conference every two weeks, is what we were thinking, to make

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1 sure the city has fulfilled its obligations.

2 I just want to let the Court know, in our conference  
3 in late July with Judge Fox, he had advised the city to produce  
4 a privilege log for example. The city has assumed that certain  
5 documents were privileged. We have not received a privilege  
6 log. We recently submitted to the city our second request for  
7 production. We received a response on September 1. It seems  
8 like the majority of the responses are: We are searching for  
9 documents.

10 THE COURT: If it comes back to me, what I am going to  
11 do, if you request, is I am going to set deadlines, and that's  
12 going to be it. If those deadlines pass and there isn't  
13 discovery, that will be held against the party who didn't make  
14 discovery.

15 It's interesting. I have often had cases where there  
16 have been delays, but once that happens, we set a deadline and  
17 that's the end of it. And that's what is going to happen here.

18 MR. SIMPSON: I also want to let the Court know, one  
19 looming issue that could potentially cause delays is, as the  
20 Court is aware, the Department of Investigation in the Bronx  
21 District Attorney's Office is conducting an investigation of  
22 the allegations contained in this lawsuit. We are eager to  
23 depose the named defendants, whose counsel are present here  
24 today. However, with an ongoing investigation, their clients  
25 aren't going to say anything with the specter of charges

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1 looming. However, they don't know if their clients are the  
2 ones being investigated, the scope of the investigation, who  
3 are the corrections officers who are being investigated.

4 I would ask that Mr. Gertzer, to get things moving,  
5 contact the DOI and at least get a determination over whether  
6 the defendants named in this case are indeed a target of  
7 investigation, because if they are not, then we can move  
8 forward with their depositions once paper discovery is  
9 complete.

10 THE COURT: He might know that today.

11 MR. SIMPSON: I don't think he does, Judge.

12 THE COURT: Do you?

13 MR. GERTZER: No, I don't know, because DOI is not  
14 going to tell me precisely what they are doing for their  
15 investigation. When I had my conversation with them a couple  
16 of months ago, right before our motion to stay the case  
17 temporarily, I did discuss the issue with DOI. All they would  
18 tell me is that they are conducting interviews of the various  
19 complainants, who I presume include the named plaintiffs. They  
20 aren't really willing to tell me any more than that, for  
21 obvious reasons, and I would presume that to the extent they  
22 are investigating the individual claims made by the various  
23 people who have made complaints about what allegedly happened  
24 at DOC jails, that the named defendants may very well be  
25 subjects of investigation. Certainly not an unreasonable

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1 conclusion to come to.

2 MR. SIMPSON: If I may respond, Judge.

3 Word on the street is that the investigation is going  
4 to take four to six months from July. So we are talking about  
5 into the winter. It could be into the spring, could be into  
6 next summer. What I am saying is that Mr. Gertzer can make  
7 assumptions, we can all talk about the possibility that they  
8 are investigating these defendants. I would like to see some  
9 diligence on the city's part, sending something in writing,  
10 getting a determination, or at least making an effort to find  
11 out if these defendants are being investigated. And if the DOI  
12 says, No, we are not responding, it's confidential, we are not  
13 going to share that information, fine. But no effort at almost  
14 any front in this case has been made to move things along.

15 THE COURT: That's not a complicated issue. I am sure  
16 Mr. Gertzer will be happy to do something.

17 MR. GERTZER: I can reach out to DOI and ask them. If  
18 they tell me no, they tell me no. I certainly do not want to  
19 interfere in the investigation.

20 THE COURT: I understand.

21 MR. GERTZER: Also, your Honor, I would like to  
22 respond to the allegations that we are dragging our feet in  
23 discovery. That simply is not the case. We had a prior  
24 meeting with Magistrate Fox. He directed us to turn over  
25 certain discovery. We did that. Thereafter, plaintiffs

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1 conducted a deposition of a former official at the Board of  
2 Corrections. The discovery demands which they reference relate  
3 mainly to things that were requested at her deposition. We  
4 just responded to that. We have been in discussions with ESI.  
5 We are right now trying to accumulate the various e-mail  
6 accounts for all the various officials that they wanted us to  
7 conduct ESI on. That's all kinds of higher-up officials at DOC  
8 and BOC. It all takes time, and we are doing this through the  
9 summer.

10 THE COURT: What does Judge Fox say about the whole  
11 thing?

12 MR. AUDAIN: Judge Fox ordered the city to produce  
13 revised initial disclosures. Judge Fox also ordered that the  
14 city produce a privilege log. Mr. Gertzer informed Judge Fox  
15 that he hadn't actually reviewed the documents. He just  
16 assumed based on the character of the documents that they were  
17 privileged so he invoked the privilege. Judge Fox explained  
18 that that's really not the right way to proceed, so he ordered  
19 the production of a privilege log.

20 THE COURT: Do you have a date before Judge Fox  
21 already or do you need to establish one if you want one?

22 MR. AUDAIN: We would like to establish one, and we  
23 would like to establish a semimonthly status conference.

24 THE COURT: You're going to propose that to him?

25 MR. AUDAIN: Yes, your Honor.

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1                   THE COURT: It might help if you got a transcript of  
2 today's proceeding and gave it to Judge Fox so he could see  
3 what was discussed here exactly. It would be helpful, it seems  
4 to me, to the extent this is doable, but Judge Fox is an expert  
5 in these matters so I am sure he can take care of them, to get  
6 some closure, or as much closure as possible under the  
7 circumstances here, but I will leave that to you all and Judge  
8 Fox.

9                   It doesn't sound like settlement has been high on the  
10 agenda among all of you; is that fair to say?

11                  MR. SIMPSON: We are always open to talking about  
12 settlement.

13                  THE COURT: But you haven't.

14                  MR. SIMPSON: No, we have not.

15                  MR. GERTZER: We haven't yet received a demand from  
16 plaintiffs. So I don't know what they are seeking.

17                  THE COURT: Is there anything to be gained by trying  
18 to have any conversations with me and each side or it's too  
19 early?

20                  MR. SIMPSON: I would say, Judge, while I appreciate  
21 the Court's efforts to get discussions moving, our position is  
22 that any discussion would be more fruitful once the city  
23 fulfills its obligation to turn over discovery.

24                  MR. GERTZER: We would also like to take some  
25 discovery from plaintiffs as well before we have those

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1 discussions.

2 THE COURT: When do you think realistically would be a  
3 good time to come back here for me to know what the status of  
4 things are?

5 MR. AUDAIN: The status of things in terms of what, in  
6 terms of the progress of discovery?

7 THE COURT: When I should set a trial date.

8 MR. AUDAIN: Had your Honor asked me in January what  
9 would have been reasonable, I would have said --

10 THE COURT: You would have said today.

11 MR. AUDAIN: Seeing how glacially this case has  
12 progressed, I dare not predict.

13 THE COURT: I don't want to just have you here  
14 unnecessarily.

15 MR. AUDAIN: This is not unnecessary at all, your  
16 Honor. This really helps keep the case moving. We found that  
17 the more the Court is involved, the more the city fulfills its  
18 obligations.

19 THE COURT: What might be a date that it might be  
20 helpful again?

21 MR. AUDAIN: If your Honor is available in November, I  
22 think that would be great.

23 THE COURT: I certainly am.

24 Here's the thing. I will set a November date, but you  
25 can tell me before it and we can change it if December or

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1 January is more sensible.

2 MR. GERTZER: Your Honor, I am going to be on vacation  
3 the last two weeks of November.

4 THE COURT: So December is better for you, early  
5 December?

6 MR. GERTZER: Yes, your Honor.

7 THE COURT: In the meantime you will have gone at  
8 least once or twice to Judge Fox, right?

9 MR. AUDAIN: Yes, your Honor.

10 THE COURT: Let's say 9:15 on December 5. We will  
11 call it a status conference.

12 MR. AUDAIN: Just a matter of housekeeping. I would  
13 just like the Court to be aware I am no longer with the firm of  
14 Giskan Solotaroff. I am now at the NAACP Legal Defense and  
15 Educational Fund. My office is in the process of getting  
16 together the paperwork necessary to change that information on  
17 ECF.

18 THE COURT: So it's just really that change. It  
19 doesn't mean you're out of the case.

20 MR. AUDAIN: I'm not out of the case.

21 THE COURT: Just a different employer.

22 MR. AUDAIN: That's correct, your Honor.

23 THE COURT: Thanks. Good to see you.

24 (Adjourned)